Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-6187

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROY ALLEN STEWART,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

STATEMENT OF THE CASE..... 1-2

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 4-5

CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

TABLE OF CITATIONS

CASES

Chambers v. Maroney,
399 U.S. 42 at 53 (1970)..... 5

Eddings v. Oklahoma,
___U.S.___, 102 S.Ct. 869 (1982)..... 4

Knight v. State,
394 So.2d 997 (Fla. 1981)..... 2

Lockett v. Ohio,
438 U.S. 586 (1978)..... 4

Rose v. Hodges,
423 U.S. 19 (1975)..... 5

Stewart v. State,
42[illegible] So.2d 862 (Fla. 1982)..... 1

United States v. Gray,
565 F.2d 881 (5th Cir. 1978) cert den.,
435 U.S. 955 (1978)..... 5

OTHER AUTHORITIES

Section 921.141(6)(b), (e) and (f)..... 1

Rule 3.850, Florida Rules of Criminal Procedure..... 5

I

STATEMENT OF THE CASE

The Defendant, Roy Allen Stewart was indicted, convicted and sentenced to death arising from his brutal rape, robbery and murder of an elderly women in her home in Miami, Florida. See, Stewart v. State, 420 So.2d 862 (Fla. 1982). On direct review to the Florida Supreme Court, the Defendant's convictions and sentence of death were affirmed. Id.

Relative to the present petition, prior to the Defendant's trial, the Defendant was examine by three (3) court appointed psychiatrists Id. at 864. Nevertheless, defense counsel persisted in asking the Florida Trial Court for the appointment of yet other psychiatrist to examine the Defendant for purposes of presenting evidence of statutory mitigation under Section 921.141(6)(b), (e) and (f), which relate to the capacity of the Defendant to appreciate the criminality of his conduct and whether or not the Defendant was under emotional "duress" or "mental or emotional disturbance". The three (3) court appointed psychiatrists found the Defendant competent to stand trial and able to assist in his defense. One of the psychiatrists, Jacobson, specifically found that the Defendant did appreciate the criminality of his conduct within the meaning of Section 921.141(6)(b) or (f). See Petitioner's Appendix at pages 25-42. All of the medical reports which were rendered well before the trial, contained extensive recitations of the Defendant's childhood, family and other background.

Relative to this petition, just prior to the sentencing phase, the Defendant's trial counsel moved again for a con-

The State's trial court denied the Defendant's Motion for a Continuance finding that further psychological examinations were unnecessary and finding specifically that the Defendant had two (2) trial attorneys preparing the present case for more than a month prior to trial. 420 So.2d at 864.

Finally, because counsel vigorously argued that he had been denied the effective assistance of counsel because of the trial court denying a Motion for a continuance at the time of the sentencing phase, the Supreme Court of Florida considered and rejected such a claim on direct appeal. Generally, in Florida, ineffectiveness assistance of counsel claims are addressed through a Motion for Post Conviction Relief filed in the trial court. See, Knight v. State, 394 So.2d 997 (Fla. 1981).

II

SUMMARY OF ARGUMENT

The Defendant has failed to present a substantial federal question arising from the opinion of the Supreme Court of Florida in applying the death penalty to the Defendant.

III

ARGUMENT

The Defendant makes three (3) arguments urging this Court to exercise its discretionary jurisdiction herein. First of all, the Defendant contends that the denial of more court appointed psychiatrists to examine the Defendant again denied counsel the right to investigate and present relevant mitigating circumstances under Lockett v. Ohio, 438 U.S. 586 (1978). Thus, the Defendant contends that the death penalty herein was arbitrary applied under Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Secondly, the Defendant makes a similar argument with regard to the denial of his counsel's request for a continuance. Finally, the Defendant asserts that the Supreme Court of Florida in applying state rules and procedures to the Defendant's claim of ineffective assistance of counsel constitutes an arbitrary and unreasonable departure from normal state procedures and thus a denial of due process.

First of all, the Defendant's premise for asserting jurisdiction herein is erroneous. The Defendant was examined by three (3) court appointed psychiatrists who certainly could have been asked any questions by the defense counsel at any time prior to trial or during trial as to the evidence of the Defendant's duress or emotional disturbance in the present case. 420 So.2d at 864. In fact, one of the psychiatrists did consider and reject any evidence that the Defendant did not appreciate the criminality of his conduct as a statutory mitigating circumstance. Probably, defense counsel did not pursue the three (3) court appointed psychiatrists' testimony because their testimony would have clearly revealed that the Defendant was just fine when he brutally raped robbed and murdered the elderly pioneer

The trial court's denial of the Defendant's Motion for a Continuance is also sounded. A summary allegation that counsel had insufficient time to prepare for trial does not raise a substantial federal question. See, Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970); United States v. Gray, 565 F.2d 881, at 887 (5th Cir. 1978), cert. den., 435 U.S. 955 (1978) (time spent in preparation in and of itself is not a showing of ineffective counsel). Further, as with the Defendant's central contention above regarding the necessity of additional psychiatric examinations, the additional evidence sought by the Defendant herein was merely cumulative to that already before the trial court and jury.

In the Defendant's final contention, he complains that the Supreme Court of Florida considered his ineffective assistance of counsel claim on direct review contrary to its normal procedure of requiring a separate Rule 3.850 Florida Rules of Criminal Procedure proceeding in the trial court. See, Knight v. State, 394 So.2d 997 (Fla. 1981). That the Florida Supreme Court choose to address the Defendant's complaint that he was denied effective assistance of counsel on direct review rather then under the Florida's separate procedure under Rule 3.850, is plainly a question of State law and procedure and therefore does not present a substantial federal constitutional question. See, e.g., Rose v. Hodges, 423 U.S. 19 (1975).

IV

CONCLUSION

WHEREFORE, on the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will deny the present Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED, on this 21st day of March, 1983, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441